

No. 77-1696

Supreme Court, U. S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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NEWPORT NEWS SHIPBUILDING AND DRY DOCK  
COMPANY, and TENNECO, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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WADE H. MCCREE, JR.,  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 571 F. 2d 1283. The opinion of the district court (Pet. App. 13a-45a) is not reported.

**JURISDICTION**

The judgment of the court of appeals was entered on February 27, 1978. The petition for a writ of

certiorari was filed on May 26, 1978. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the parties entered into a binding contract.
2. Whether the court of appeals applied the correct standard in reviewing the district court's judgment.

### STATEMENT

In 1971 petitioner Newport News contracted with the Navy to build three ships. The contract contained a provision giving the Navy an option for a fourth ship, exercisable before a certain date.<sup>1</sup> The parties extended the option date to February 1, 1975, provided certain conditions were satisfied, including the parties' undertaking to negotiate certain matters in good faith. In August 1974 Newport News notified the Navy that it regarded the option to be void because, it asserted, the Navy had failed to negotiate in good faith. On January 31, 1975, the Navy formally undertook to exercise the option, notwithstanding Newport News' claim that it was void.

The United States brought this suit in August 1975, seeking specific performance of the contract and an order directing Newport News to resume work. Before the district court ruled on the government's

<sup>1</sup> The history of this controversy is set forth more fully in the opinions of the district court (Pet. App. 16a-27a) and the court of appeals (Pet. App. 1a-5a).

request for preliminary relief, the parties concluded a new agreement. This agreement, which was entered as an order of the court, was a covenant "to negotiate in good faith to reach an agreement as rapidly as possible to modify those contract provisions requiring amendment or to take other appropriate action" (Pet. App. 22a). On July 13, 1976, after some further unsuccessful negotiating efforts, the Navy appointed Gordon Rule as its negotiator and on August 19, 1976, issued Rule a warrant granting him "unlimited authority with respect to negotiations" (*id.* at 3a). But although Rule had plenary authority to negotiate, he was informed several times during the negotiations that he did not have contracting authority, and that any agreement he might negotiate would require the review and approval of higher officials (*id.* at 4a).

On August 20, 1976, Rule negotiated an oral agreement, which would result in an increased cost to the Navy of approximately \$22.7 million (Pet. App. 3a, 11a). On August 30, and again on September 27, 1976, Newport News prepared and submitted to Rule written drafts purporting to memorialize the oral agreement. Rule did not sign those drafts because they contained unacceptable price increase provisions. Newport News executed a third draft on October 7, 1976, and sent it to Rule. Rule signed the draft on that day but set two significant conditions in his cover letter returning the draft to petitioner (*id.* at 3a):

- (i) That ultimate approval must be received from Deputy Secretary of Defense Clements, and

(ii) That escalation under this Mod [i.e., modification of the contract] will be paid by the Government on the basis of the contractor's actual experience or the BLS Indices times 1.25, whichever is less.

On October 15, 1976, Deputy Secretary Clements sent a copy of the proposed compromise to the Attorney General "for your approval and such legal action as may be necessary to obtain ratification" (Pet. App. 12a). Although Clements recommended approval, the Attorney General disapproved the proposed agreement on November 24, 1976 (*id.* at 4a).

Newport News then asked the district court to enter judgment in its favor or to dismiss the complaint on the ground that the parties had entered into a binding contract settling all the issues in the case. The district court held, on the basis of the documentary evidence and without an evidentiary hearing, that the August 20, 1976, oral agreement was a binding contract. It stated that Rule had authority contractually to bind the government and that the agreement was adequately memorialized in written documents (Pet. App. 31a-38a). The court held that the government was estopped from relying on the disapproval of the Attorney General because the government had stated to the court that the parties would negotiate in good faith, and the Justice Department had delegated those negotiations to the Navy (Pet. App. 38a-41a). As an alternative ground for dismissing the government's suit for specific performance, the district court held that the government

had not negotiated in good faith and was therefore not entitled to an equitable remedy (Pet. App. 27a-29a).

The court of appeals reversed. It held that the August 20, 1976, agreement was not a binding contract because the "uncontradicted facts disclos[e] that the parties did not intend to commit themselves irrevocably to an oral settlement of the case on August 20" (Pet. App. 6a). The court relied for that conclusion on (a) the fact that two drafts submitted to Rule after August 20 were not accepted by him because they contained substantive provisions about which the parties disagreed (and continued to disagree later in the district court); (b) the fact that Rule conditioned his signing Newport News' third draft on the approval of Deputy Secretary Clements; (c) the fact that Clements himself submitted the proposal to the Attorney General for approval; and (d) the fact that 28 U.S.C. 516 and 519 authorize the Attorney General to supervise all litigation involving agencies of the government unless otherwise specified by law (Pet. App. 6a-9a). The court also held that the evidence did not establish bad faith on the part of the government sufficient to preclude its claim for equitable relief under the unclean hands doctrine, and that summary disposition of the case on that basis was inappropriate (Pet. App. 9a-10a). It therefore remanded for further proceedings on that issue and other outstanding issues in the case (Pet. App. 10a).



### ARGUMENT

The decision of the court of appeals is correct. It turns on the particular facts relating to the parties' understanding and intent with respect to their negotiations, and it presents no issue of general importance requiring review by this Court.

Petitioners assert (Pet. 2, 15-20) that this case presents the question whether the Attorney General has the authority to set aside a binding contract executed by the Navy, when that contract would moot pending litigation. The case, however, presents no such question. The threshold question here is whether Newport News and the Navy entered into a binding contract, and that question turns on their intent and understanding. The record amply supports the court of appeals' conclusion that the Navy never intended the drafts prepared by Newport News to be binding.

Newport News, after August 20, submitted three drafts to Rule purporting to reflect their oral agreement. Rule did not sign the first two drafts, because they contained substantive provisions about which there remained disagreement. He signed the third draft but expressly conditioned his signature on (1) acceptance by Newport News of the government's position on the cost increase clause, and (2) ultimate approval by the Deputy Secretary of Defense, Mr. Clements.<sup>2</sup> Clements in turn submitted the draft to the

<sup>2</sup> The court of appeals stated (Pet. App. 6a) that Rule's inclusion of conditions to his acceptances precluded the creation of a binding contract "until the condition has been withdrawn or satisfied," citing *Orient Mid-East Great Lakes*

Attorney General and never gave his personal approval. The undisputed facts therefore establish that the parties' actions in this case did not create a contract.

That conclusion is further supported by 28 U.S.C. 516 and 519, which authorize the Attorney General to direct and supervise all litigation involving agencies such as the Navy, and which have long been held to include his authority over the settlement of pending litigation. *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458; *New York v. New Jersey*, 256 U.S. 296, 308. The Attorney General's well recognized statutory role in the settlement of litigation justifies the presumption that, as a factual matter, the parties did not intend to bind themselves without obtaining his approval.<sup>3</sup>

*Service v. International Export Lines, Ltd.*, 315 F. 2d 519, 522 (C.A. 4). In our view the law on this point is even less favorable to petitioners. When B accepts A's offer to B on condition that A accept certain material changes (here the escalation provision), B has given a counteroffer, which extinguishes A's offer unless the facts indicate a contrary intent. B cannot create a contract by removing or satisfying his condition. The contract is created only when A accepts the counteroffer. *Williston on Contracts* § 77 (Jaeger ed.). There is no evidence of Newport News' acceptance of Rule's escalation provision; as the court of appeals noted, Newport News continued to press for its version of the cost escalation provision in the district court hearing on its motion to enforce the contract (Pet. App. 6a). This point does not affect the result here, however. The facts still support the court of appeals' conclusion that the parties never committed themselves to the August 20 oral agreement.

<sup>3</sup> Because the facts establish that the parties did not intend to bind themselves to a contract, it is immaterial whether Rule had the legal authority to enter into a binding contract

Petitioners also argue (Pet. 21-28) that the court of appeals failed properly to apply the "clearly erroneous" standard of review of Fed. R. Civ. P. 52(a) in reversing the district court's judgment. Rule 52(a), however, does not apply. Rule 52(a) provides that "[i]n all actions tried upon the facts \* \* \* the court shall find the facts specially \* \* \*", and further provides in relevant part that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 and 56 or any other motions \* \* \*." In this case petitioner moved for "Entry of Judgment or, In the Alternative, for Dismissal with Prejudice" (Pet. 11); this, although not expressly so termed, was clearly a motion for summary judgment under Rule 56. Thus, the district court held no evidentiary hearing and ruled entirely on the documentary record. The district court was not entitled to "find" facts without a trial; as in all summary judgment proceedings, the facts must be taken in the light most favorable to the person opposing the motion.

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or whether, if he had done so, the Attorney General would have had the legal authority to set it aside. Therefore, petitioners err in claiming that this case presents the latter issue. In our view, however, the Attorney General has that authority in the circumstances of this case, and the cases cited by petitioner (Pet. 18-20) are not to the contrary. *S & E Contractors, Inc. v. United States*, 406 U.S. 1, did not involve pending litigation in which the Department of Justice was representing an agency; it involved, instead, an effort by the Department of Justice to obtain judicial review of an agency decision. The holding in *Leonard v. United States Postal Service*, 489 F. 2d 814 (C.A. 1), was based on the special statutory language of the Postal Service statute, and the language relied on by petitioners is *dictum*.

Moreover, the court of appeals' decision was based on the uncontradicted facts. There is therefore no basis for petitioner's claim that the court applied an incorrect standard of review. See, *e.g.*, *United States v. Diebold, Inc.*, 369 U.S. 654, 655.<sup>4</sup>

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,  
Solicitor General.

AUGUST 1978.

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<sup>4</sup> Even if the "clearly erroneous" standard had been applicable, the uncontradicted facts outlined above rendered the district court's conclusion that the parties had executed a binding agreement clearly erroneous.